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In The
Supreme Court of the United States
October Term 1997

CITY OF CHICAGO,
Petitioner,

v.

JESUS MORALES, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* NATIONAL BLACK POLICE ASSOCIATION, CHICAGO NBPA, HISPANIC NATIONAL LAW ENFORCEMENT ASSOCIATION, and NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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TABLE OF AUTHORITIES

Cases

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Bell v. Bolger,
708 F.2d 1312 (8th Cir. 1983) 20

Bowen v. Kemp,
769 F.2d 672 (11th Cir. 1985) 20

Castaneda v. Partida,
430 U.S. 482 (1977) 19, 20

Chicago v. Morales,
177 Ill. 2d 440 (1997) 15, 16

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 17

Coates v. Cincinnati,
402 U.S. 611 (1971) 10

Colten v. Kentucky,
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Eccleston v. Secretary of Navy,
700 F. Supp. 67 (D.D.C. 1988) 20

Garner v. Lousiana,
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Kolender v. Lawson,
461 U.S. 352 (1983) ..... *passim*

McWilliams v. Escambia County School Bd.,
658 F.2d 326 (5th Cir. Unit B 1981) 20

Oncale v. Sundowner Offshore Servs. Inc.,
140 L. Ed. 2d 201 (1998) 20

Papachristou v. City of Jacksonville,
405 U.S. 156 (1972) ..... *passim*

Peterson v. City of Greenville,
373 U.S. 244 (1963) 2

Shuttlesworth v. City of Birmingham,
382 U.S. 87 (1965) 2

Smith v. Goguen,
415 U.S. 566 (1984) 9

Tennessee v. Garner,
471 U.S. 1 (1985) 2

Thompson v. City of Louisville,
362 U.S. 199 (1960) 2

United States v. Thomas,
787 F. Supp. 663 (E.D. Tex. 1992) 20

West Virginia State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 21

Winters v. New York,
333 U.S. 507 (1948) 8

Wright v. Georgia,
373 U.S. 284 (1963) 2

Statutes and Rules

Supreme Court Rule 37.3(a) 1

Supreme Court Rule 37.6 1

Treatises and Other Materials

Associated Press, *Black Nashvillians Leery of Police Conduct*, Memphis Comm. App., Aug. 28, 1997. 3

Edward Patrick Boyle, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 Vand. L. Rev. 937 (1993) 20-21

Sandra Lee Browning, *et al.*, *Race And Getting Hassled By The Police: A Research Note*, 17 Police Studies 1 (1994). 19

Knight Chamberlain, *Cooperation Cuts Crime*, Raleigh News & Observer, Jan. 5, 1997 4

Chicago Community Policing Evaluation Consortium, *Community Policing in Chicago, Year Four: An Interim Report* (Nov. 1997) 28

James H. Colopy, *The Road Less Traveled; Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 Stan. Envtl. L.J. 125 (1994) 21

Richard M. Daley & Terry G. Hillard, *Gang and Narcotic Related Violent Crime: City of Chicago 1993-1997* (1998) 24, 28

Paula Dittrick, *Police Chiefs Discuss Race Relations*, United Press Int'l, Sept. 26, 1996 3

Editorial, *More Citizen Involvement Helps Keep Boise Streets Safe*, Idaho Statesman, June 19, 1998 4

Herman Goldstein, *Toward Community - Oriented Policing: Potential, Basic Requirements and Threshold Questions*, 33 Crime & Delinquency 6 (1987) 21

Judith A. Green, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, Crime & Delinquency (forthcoming April 1999) 23

Robert Ingrassia, *Police Shooting Was Dallas Turning Point*, Dallas Morning News, Oct. 27, 1996 4

Jay Jochnowitz, *Arbor Hill Station Hits Roadblock*, Times Union, Oct. 8, 1996 4

Dirk Johnson, *Two Out of Three Young Black Men In Denver Listed By Police as Suspected Gangsters*, N.Y. Times, Dec. 11, 1993 11-12

George Kelling & Katherine Coles, *Fixing Broken Windows* (1996) 26

David Kennedy, *Pulling Levers: Getting Deterrence Right*, Nat'l Inst. Just. J. (July 1998) 23

Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (1998) 3

Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L. Rev. 551 (1997) 21, 26

Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191 (1998) 28

Mark H. Moore, *Problem-Solving and Community Policing in* Modern Policing 1992 (Crime & Justice: A Review of Research Series No. 15, 1992, M.Tonry & N. Morris, eds.) 21, 23

Deposition Transcript of Thomas Needham in *ACLU v. City of Chicago*, 98 CH 10054 (Circuit Court of Cook County, Illinois) 13

David Ogul, *White Police and Black Community a Mix that Works*, Press-Enterprise (Riverside, CA), Oct. 6, 1996 4

Robert Olmstead, *Cops taking EDGE in Crime Battles*, Chi. Sun-Times, July 5, 1994 16

Colin Poitras, *Nominee Plans Visibility in Job*, Hartford Courant, Jan. 30, 1998 4

Ira Reiner, *Gangs, Crime and Violence in Los Angeles: Findings and Proposals from the District Attorney's Office* (1992) 12

Janet Reno, *Civil Rights: A Challenge of Conscience*, 27 Cumb. L. Rev. 381 (1996/1997) 4

Report of the National Commission on Civil Disorders, (1968) 23, 26

Dennis P. Rosenbaum, *et al.*, *The Prevention of Crime: Social and Situational Strategies*, (1998). 19, 22, 23

Andrew D. Russell, *Portland Minorities, Police Try to Bridge Deep Cultural Abyss*, Portland Press Herald, Dec. 9, 1996 4

Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. Pa. L. Rev. 1041 (1984) 20

Fran Spielman, *Daley to Simon: Quit "Nitpicking" Over Crime Bill*, Chi. Sun-Times, Sept. 1, 1994 16

Fran Spielman, *Loitering Ban Passes; Alderman Bitterly Split on Anti-Gang Measure*, Chi. Sun-Times, June 18, 1992 14

Sweep Nets 100 Arrests, Chi. Sun-Times, Feb. 6, 1994 6

Randy Tucker & Jena Janovy, *Little Police, Minority Trust Seen Police-Community Relations Problems*, Omaha World-Herald, Sept. 1, 1998 4

Matthew Waite, *Kids Learn Cops 'Do More than Shoot.'* Ark. Democrat-Gazette, Aug. 14, 1997 4

Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View, in* Perspectives on Policing (U.S. Dept. of Justice, Nat'l Inst. of Justice No. 13, Jan. 1990) 18

STATEMENT OF INTERESTS OF *AMICI*[1/]

Amici, a unique coalition of a national civil rights legal organization and law enforcement professionals, are brought together by their mutual interest in building strong relationships between the police and the communities they serve, in minimizing the traditionally adversarial and antagonistic interactions between police and community residents, and in eliminating discriminatory enforcement of criminal laws.

The National Black Police Association ("NBPA") is an organization of minority law enforcement professionals. NBPA has more than 34,000 individual members and more than 140 chapters in police departments in 34 states and the District of Columbia. The Chicago chapter of NBPA joins this coalition as an *amicus*. NBPA and its members support the philosophy of community policing that calls for a true, cooperative partnership between the community and the police for safer communities.

The Hispanic National Law Enforcement Association ("HNLEA") is a nationwide organization of Latino American police officers. HNLEA has local chapters in all major cities throughout the United States, as well as three chapters in Puerto Rico. Congress has recognized HNLEA as the only national organization representing Latino officers. Members of HNLEA are dedicated to the promotion of justice, fairness and effectiveness in law enforcement. One of its primary missions is to improve the relationship between minority communities and the police in order to promote the safety of the public and the quality of life in those communities. As part of that mission, HNLEA seeks to eliminate police brutality and racial discrimination in law enforcement.

1/ Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation (established in 1940) organized to assist African Americans in securing their constitutional and civil rights. Its purpose includes rendering legal aid without cost to African Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For almost sixty years, its attorneys have represented parties and have participated as *amicus curiae* in this Court and in the lower state and federal courts.

LDF has a long-standing concern with the influence of racial discrimination in the enforcement of loitering ordinances. It has successfully challenged ordinances similar to the one at issue here when they have been arbitrarily employed against civil rights demonstrators; *see, e.g.*, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Garner v. Lousiana*, 368 U.S. 157 (1961); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Avent v. North Carolina*, 373 U.S. 375 (1963), and against minority citizens lawfully enjoying public spaces, *Wright v. Georgia*, 373 U.S. 284 (1963); *Thompson v. City of Louisville*, 362 U.S. 199 (1960). LDF's continuing concern over the arbitrary and destructive use of police power led it to represent the respondent in *Tennessee v. Garner*, 471 U.S. 1 (1985).

It is not often that *amici* find ourselves in complete agreement about the lawfulness and wisdom of a criminal ordinance. But we do in this case. The Chicago Gang Loitering Ordinance is a broad, standardless law that invites arbitrary and discriminatory enforcement. The Court has seen laws like this before and has properly struck them down as unconstitutional.

Amici are concerned about the impact of such laws upon effective law enforcement. For much of our history, law enforcement has lacked credibility in minority communities because of racist and arbitrary enforcement of the law. Scholar Leon F. Litwack recalls accurately how many African Americans came to view police earlier this century:

> From the very outset of their lives, young blacks came to learn that in the New South the differences between justice and injustice, the law and lawlessness, were at best ambiguous, at worst senseless, so blurred as to be indistinct. The ways in which they experienced the courts and police power were hardly calculated to enhance their respect for the law or for the white man's sense of fair play. The very relationship black people bore to protective agencies contrasted sharply with that of whites. Even as white children were inculcated with the image of the policeman as a friend and protector, black children learned to fear him as the enemy.

Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* 15 (1998).

And while we have made progress in bridging this divide, it is just as clear that we have much work yet to do. An overwhelming body of evidence confirms that deep mistrust remains between minority communities and the police. In recent years, Minneapolis police chief Robert Olsen characterized relations between his department and minority citizens as "a tinder box,"[1] Nashville police chief Emmett Turner acknowledged strained relations between police and minority citizens,[2] and Portland's police chief, Michael Chitwood, noted that "every time the police interact with the minority community there's a perception that they're being

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[1] Paula Dittrick, *Police Chiefs Discuss Race Relations*, United Press Int'l, Sept. 26, 1996.

[2] Associated Press, *Black Nashvillians Leery of Police Conduct*, Memphis Comm. App., Aug. 28, 1997, at A18.

picked on."[4] In light of those statements, it is not surprising that Attorney General Janet Reno concluded that:

> [a] crucial item on the [Department of Justice's] agenda . . . is an effort to build a greater sense of community and trust between law enforcement and the minority community. There is no other area where the potential for misunderstanding and miscommunication can have such dangerous consequences. . . . So it is an absolute imperative that we establish better trust, cooperation and communication between the community and the police.

Janet Reno, *Civil Rights: A Challenge of Conscience*, 27 Cumb. L. Rev. 381, 393-94 (1996/1997).

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[4] Andrew D. Russell, *Portland Minorities, Police Try to Bridge Deep Cultural Abyss*, Portland Press Herald, Dec. 9, 1996, at 1A.

From coast to coast, other cities have reported similar tensions. Public officials in Albany, New York recently reported that many minority citizens "don't trust the police." Jay Jochnowitz, *Arbor Hill Station Hits Roadblock*, Times Union, Oct. 8, 1996, at B5. Recent shootings of minority citizens in Boise, Charlotte, Little Rock and Lima, Ohio, have strained police-community relations. *See* Editorial, *More Citizen Involvement Helps Keep Boise Streets Safe*, Idaho Statesman, June 19, 1998, at 12a; Knight Chamberlain, *Cooperation Cuts Crime*, Raleigh News & Observer, Jan. 5, 1997, at B1; Matthew Waite, *Kids Learn Cops 'Do More than Shoot,'* Ark. Democrat-Gazette, Aug. 14, 1997, at 1A; David Ogul, *White Police and Black Community a Mix that Works*, Press-Enterprise (Riverside, CA), Oct. 6, 1996, at A05. Dallas police officers conceded that the African American community is repeatedly "bombarded with officers conducting illegal searches, approaching black and Hispanic males and placing them on the ground." Robert Ingrassia, *Police Shooting Was Dallas Turning Point*, Dallas Morning News, Oct. 27, 1996, at 1A. Hartford police chief Edward Brymer noted recently that "[t]here has been resentment toward police officers accused of harassing minorities and using excessive force." Colin Poitras, *Nominee Plans Visibility in Job*, Hartford Courant, Jan. 30, 1998, at B1. Recently, the Omaha Human Relations Board concluded that minorities do not have much trust in the police, and "feel mistreated or harassed by the police because of their race." Randy Tucker & Jena Janovy, *Little Police, Minority Trust Seen Police-Community Relations Problems*, Omaha World-Herald, Sept. 1, 1998, at News-1.

The Chicago ordinance will only exacerbate traditionally strained relations between minority communities and police. While *amici* are well aware of the many problems that gangs can visit upon a community, we cannot endorse this particular tool that will harm both community-police relations and the detection and prevention of crime.

SUMMARY OF ARGUMENT

Chicago's broad Gang Loitering Ordinance (the "ordinance") is unconstitutionally vague under long-established standards of this Court. It fails to define in any meaningful way the conduct that is prohibited. It leaves to an officer's unfettered discretion the decision as to whether to deem conduct an "apparent purpose," or "movement" out of the "area" sufficient to satisfy the ordinance. As in *Kolender v. Lawson*, the ordinance "may permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal predilections." 461 U.S. 352, 358 (1983). It provides a tool for "harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure." *Id.* at 360. The ordinance is simply another version of the abusive and discriminatory "street sweeps" that have been condemned uniformly by the courts and commentators as unconstitutional and ineffective.

There is nothing about the ordinance, contemporary law enforcement or current circumstances that warrants departure from the well-settled body of law applied by the Illinois Supreme Court in finding the ordinance unconstitutionally vague. Contrary to the assertions of certain *amici* for Chicago, discrimination in law enforcement remains a matter of real and grave concern. Standardless laws such as the ordinance, which leave enforcement to the unguided discretion of the police, exacerbate the risks of discriminatory enforcement. They also heighten the risk of damaging relations between the police and the community resulting from the perception of discriminatory enforcement.

Chicago and certain of its *amici* assert that the potential for abuse of the ordinance need not concern the Court because the ordinance enjoys some community support and is a manifestation of "community policing." Pet. Br. 14-15. They contend that effective community policing requires that the courts "provide greater leeway" for state and local governments to address "signs of chronic disorder on the streets." Pet. Br. 15; *Amicus* Brief of 20 Neighborhood Organizations ("CNO Br."), *passim*. Chicago and its *amici* further assert that Chicago's experience with the enforcement of the ordinance from 1992 to 1995 "validated" its effectiveness. Pet. Br. 16. Each of those propositions is incorrect.

The ordinance is, in fact, the antithesis of community policing and of sound law enforcement practice. Two of the most important pillars of community policing are the strengthening of relationships between police and community residents, and the employment by police of a wide range of alternatives to the traditional law enforcement strategies of arrest and prosecution, saving traditional law enforcement for those cases in which it can do the greatest good. The ordinance is contrary to both principles.

Rather than eschew traditional law enforcement strategies in favor of more innovative, flexible approaches to the community's problems, the ordinance directs the police to arrest and prosecute thousands. The City's statistics show that there were in excess of 41,000 arrests under the ordinance during the three years of its enforcement. Contrary to Chicago's repeated suggestion that the ordinance targets only "visibly lawless" behavior (Pet. Br., *passim*), in fact, the ordinance targets otherwise innocent behavior. The net cast by the ordinance is extremely wide, sweeping into the criminal justice system large numbers of people who are guilty of no crime other than standing, sitting or remaining in one place on the public sidewalks, in public parks, or in other public places, in the vicinity of a suspected gang member and in a manner that piques an officer's antipathy. The ordinance thus significantly multiplies the number of hostile, adversarial interactions between the police and citizens, principally minority citizens. Rather than

strengthening relations, the ordinance widens the gulf between police and community.

Nor does Chicago's experience "validate" the efficacy of the ordinance. The crime statistics for the City of Chicago for the relevant periods do not show that enforcement of the ordinance reduced crime. Since 1992, there has been a nationwide decrease in crime in communities of all types and sizes using all sorts of law enforcement techniques. This decline has been attributed to a variety of factors, none of which is precisely understood. What is clear, though, is that there is no empirical basis for concluding that enforcement of the ordinance had any effect on crime. The drop in the crime rate began before Chicago enforced the ordinance and continued after it ceased enforcement.

While gang crime is unquestionably a serious problem, it is not necessary to suspend constitutional principles to address it. The Chicago Police Department's representative at City Council hearings on the ordinance acknowledged that fact, and the experience of cities, like San Diego and Boston, confirms it. Those cities have achieved substantial reductions in crime without the use of extreme measures like the Gang Loitering Ordinance.

ARGUMENT

I.
THE GANG LOITERING ORDINANCE IS UNCONSTITUTIONALLY VAGUE

A consistent theme throughout the briefs of Chicago and its *amici* is their concern about gang-related crime and the detrimental effect criminal gang activity has on the surrounding community. These *amici*, as law enforcement professionals and members of communities that are disproportionately affected by gang crime, share those concerns. Unfortunately, those concerns are not new, and neither is Chicago's approach to them. The desire to prevent and combat crime has been the articulated rationale for other loitering and vagrancy laws previously considered by the Court,

including the statute at issue in *Kolender*. But, as the Court admonished in that case, the desire to combat crime cannot suspend constitutional protections against vague laws. As Justice O'Connor noted:

> Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity.

Kolender, 461 U.S. at 361.

This Court's emphasis on definiteness and clarity stems from long experience with abusive and discriminatory enforcement that too frequently accompanies standardless or imprecise laws:

> "These [vagrancy] statutes are in a class by themselves, in view of the familiar abuses to which they are put . . . . Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided."

Papachristou v. City of Jacksonville, 405 U.S. 156, 166 (1972)(*quoting Winters v. New York*, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting)).

This Court has long made clear that an ordinance fails to meet constitutional standards of "definiteness and clarity" not only where the ordinance fails to provide adequate notice so that "ordinary people can understand what conduct is prohibited," but

more importantly, where the legislature has failed to "'establish minimal guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 357-58 (*quoting Smith v. Goguen*, 415 U.S. 566, 574 (1984)). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* at 358 (*quoting Smith*, 415 U.S. at 575). Chicago's ordinance does not meet that standard.

A. The Ordinance Impermissibly Leaves Enforcement To The Unconstrained Predilections Of The Police.

The "more important aspect of the vagueness doctrine, 'is . . . that a legislature establish minimum guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 358 (*quoting Smith*, 415 U.S. at 574). Chicago contends that the ordinance satisfies this important requirement because it applies only to persons who (i) do not have an apparent purpose, (ii) are loitering with a person reasonably believed to be a gang member, and (iii) fail to move on when ordered to do so. Pet. Br. 34-35. Contrary to Chicago's assertion, however, the ordinance, "by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute," *Id.* at 361, encourages arbitrary and discriminatory enforcement in precisely the manner as did the laws this Court held unconstitutional in *Papachristou* and *Kolender*. Specifically, the ordinance provides no guidelines as to (i) what constitutes loitering -- that is, what is or is not an "apparent purpose," (ii) what persons are considered to be "'with" a suspected gang member, and (iii) what action will satisfy an order to "move on."

1. The ordinance vests an officer with unfettered discretion to conclude that a person does not have an "apparent purpose" and is therefore "loitering."

The ordinance defines loitering as "remain[ing] in any one place with no apparent purpose." Pet. App. 61a. Chicago and its *amici* argue that the ordinance does not vest the police with unfettered discretion to determine whether a person is "loitering."

However, the Illinois Supreme Court found to the contrary, holding that the ordinance provides the police officer with "absolute discretion . . . to decide what activities constitute loitering." Pet. App. 15a. That decision was clearly correct.

Chicago's description of the "no apparent purpose" requirement as "straightforward[]" (Pet. Br. 30) is contradicted by its confusing assertions in this Court and elsewhere as to what would or would not be an "apparent purpose." For example, "gazing at the nighttime sky" and "loafing through the day" are apparent purposes, according to Chicago (Ill. App. Br. at 70-71), whereas standing on a public sidewalk to get fresh air, sitting on a park bench or simply chatting with friends is not. *See* Pet. Br. 38; Supp. R. II at 231. Chicago does not point to anything in the ordinance (or elsewhere) that would lead an officer to draw those distinctions.

Further, the fact that two persons are "chatting" should be apparent to the outside observer. To conclude, as Chicago suggests (Pet. Br. 38), that chatting is not an "apparent purpose" really means that "chatting" is not an *acceptable* purpose under the ordinance. The ordinance's language, however, provides no guidance as to why that or any other apparent purpose is unacceptable. The officer, therefore, is required to bring to bear his or her own personal predilections to conclude that "chatting" or "sitting," however apparent, is not an acceptable "purpose." Chicago's own examples make clear that what is a "purpose" and what is "apparent" are left to the officer's absolute discretion.

It is precisely such subjective, standardless discretion that results in enforcement decisions that may vary arbitrarily not only from officer to officer but from decision to decision by the same officer. *See, e.g.*, *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (holding ordinance void for vagueness where violation may have depended entirely on whether a particular officer was annoyed by conduct of persons subject to the ordinance); *Kolender*, 461 U.S. at 360-61 (holding loitering ordinance void for vagueness where officers had complete discretion to conclude whether suspects had

shown "'credible and reliable' identification"); *Papachristou*, 405 U.S. at 170-71 (holding vagrancy law unconstitutionally vague where the ordinance provided imprecise standards for enforcement, thus allowing persons to stand on public sidewalks, etc. only at the whim of the police). The "no apparent purpose" requirement is so amorphous that Chicago is even unwilling to state without equivocation that a parade or picketing is a clearly apparent purpose falling outside of the proscriptions of the ordinance. *See* Pet. Br. 10, 20 (acknowledging only that the ordinance would "rarely, if ever" apply to parades, picketing or protests).[8]

2. The ordinance vests an officer with unfettered discretion to conclude that a person is "loitering with" a suspected gang member.

The ordinance is imprecise in yet another way. The ordinance applies not only to persons reasonably believed to be gang members, but also to all persons who are deemed to be "with" a "loitering" gang member. While Chicago focuses on "street gang members and their cohorts" (Pet. Br. 9), the ordinance is clearly not so limited.[9] It applies to any and all persons with a "loitering"

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[8] Even the Solicitor General is unable to discern what constitutes an "apparent purpose" under the ordinance. In his *amicus* brief in support of the ordinance, the best that the Solicitor General can do is to suggest what the term loitering would "likely" include and would "not likely" include. *See* Amicus Brief of the United States ("U.S. Br.") at 16. Chicago and the Solicitor General reach different conclusions about what is or is not included. Whereas Chicago leaves open the possibility that picketing and protests may be subject to the ordinance, the Solicitor General assures the Court that demonstrations and picketing "will be apparent to outsiders" and thus beyond the ordinance. U.S. Br. 13.

[9] Even if its proscriptions were limited to persons believed by police to be gang members, the ordinance could encompass a substantial number of the young people in many communities -- particularly minority youth. In Denver, for example, African American and Hispanic youths dominated a list of suspected gang members compiled by police. The list itself was so large that it included approximately two-thirds of the African American males in the city between the ages of 12 and 24. Dirk Johnson, *Two Out of Three Young Black Men In Denver*

(continued...)

individual reasonably believed by the police officer to be a gang member. The ordinance, which requires no interaction between the suspected gang member and other persons, supplies no guidelines for an officer to use to determine whether a person is "with" the suspected gang member, as opposed to merely being near or in the general vicinity of a suspected gang member.[2/]

This absence of legislative standards leaves the officer with absolute discretion in enforcement. For example, according to Chicago, the presence of a single gang member in a public playground with 99 other non-gang members is sufficient to authorize an officer to order the entire group of 100 persons to disperse and to arrest any who refuse to do so. *See* Supp. R. II at 229-30. This is true, as discussed below, even if the other 99 persons have no knowledge that a suspected gang member is present in the public playground. It may well be unlikely that the police would oust or arrest 99 people because of the presence of a single suspected gang member. The ordinance permits it, however, and the decision as to how many and which of the 99 to threaten with arrest is left wholly to the whim of the officers.

3. The ordinance vests an officer with unfettered discretion to conclude that a person has failed to "move on."

The ordinance further provides that an officer shall order persons in violation "to disperse and remove themselves from the

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[2/](...continued)
Listed By Police as Suspected Gangsters, N. Y. Times, Dec. 11, 1993, at A-8. In Los Angeles in 1992, 47% of the African American males between the ages of 21 and 24 were listed on a gang database maintained by the police. Ira Reiner, *Gangs, Crime and Violence in Los Angeles: Findings and Proposals from the District Attorney's Office* 121 (1992).

[2/] The Solicitor General contends that the ordinance is limited to "gang members or those who participate in groups containing gang members." U.S. Br. 10. The ordinance, however, imposes no requirement of participation. Rather, it applies by its terms to all persons "with" a "loitering" suspected gang member.

area," what Chicago commonly refers to as a "move on" order. Pet. App. 61a. While Chicago contends that the "move on" order is clear and cannot be misunderstood (Pet. Br. 29), that is not so. The "move on" order is yet another unclear element of the ordinance that enhances the potential for arbitrary and discriminatory enforcement.

For example, the ordinance provides no guidelines as to how far one must move in order to be removed "from the area." The "area" is not defined geographically or even conceptually. There is no gauge by which either the police officer or the citizen can determine whether it would be sufficient to move across the street, down the street, out of a park, or to another neighborhood entirely.[2/] Nor does the ordinance provide any guidance as to the length of time that a person must remove himself or herself from the area in order to avoid arrest -- ten minutes? An hour? A day? The ordinance does not provide either the officer or persons subject to the ordinance with answers to these very basic questions.

In this manner, the "move on" order is critically different from the directive issued by the officer in *Colten v. Kentucky*, 407 U.S. 104 (1972). In *Colten*, the Court determined that a person could be ordered to "move on" where he was interfering with an officer issuing a traffic citation. The Court agreed that the order was "suited to the occasion." *Id.* at 109-10. Unlike "move on" orders under the ordinance here, in *Colten* one could easily understand, based on external clues provided by the occasion itself, that "move on" meant to remove onself from the immediate vicinity of the traffic incident for so long as it took the officer to issue the citation and conclude the incident.

[2/] The "area" could be very large. A city representative testified in a lawsuit brought by the ACLU under the Illinois Freedom of Information Act that locations designated for enforcement of the ordinance included parks and public housing developments. Deposition Transcript of Thomas Needham at 86, filed with the Circuit Court of Cook County, Illinois in *ACLU v. City of Chicago, et al*, 98 CH 10054. Some of Chicago's parks extend for miles and others are as large as many square blocks. Chicago's public housing developments may also be many acres in size, and may be home to persons told to leave the areas.

There are no such external limitations provided, however, where one is ordered to remove oneself "from the area" pursuant to the ordinance. There is no apparent geographic boundary that delineates the "area" or that establishes what would be a sufficient distance to avoid arrest. Nor is there an objective time limit that would indicate when one could return to the public area and not be subject to arrest. The officer has complete discretion to define the public area from which the citizen is excluded on pain of arrest and the duration of that exclusion. Such untrammeled power to banish any person deemed by the arresting officer to be undesirable understandably prompted one of Chicago's African American aldermen to say during City Council hearings that the ordinance is reminiscent of the "pass laws of South Africa." Fran Spielman, *Loitering Ban Passes; Alderman Bitterly Split on Anti-Gang Measure*, Chi. Sun-Times, June 18, 1992, at A-1.

B. The Ordinance Fails To Provide Actual Notice Of What Conduct Is Prohibited.

The ordinance fails to provide citizens with actual notice so that "ordinary people can understand what conduct is prohibited." *Kolender*, 461 U.S. at 357. For example, the ordinance does not, as discussed above, disclose what purposes the police may deem unacceptable. That critical omission not only invites arbitrary and discriminatory enforcement, but also leaves Chicago's citizens without any notice as to what behavior would be subject to the ordinance.

Chicago argues that the "move on" order provides notice that a person's conduct is subject to the ordinance. Pet. Br. 29. But, as even Chicago concedes, "[i]f police officers are afforded standardless discretion to order individuals to move on, the mere fact a police order is given does not serve to sustain the order." Pet. Br. 32. As discussed above, the ordinance does give police

that discretion.[9] Given that the meaning of the ordinance is defined by the "personal predilections" of the police, there is no way that a person can know what conduct will lead to a police order to "move on."

Moreover, although a predicate for arrest under the ordinance is the presence of a "loitering" suspected gang member, there is no requirement that any other individual in that same public place be on notice that a gang member is present. While Chicago focuses on "gang members and their cohorts," suggesting that a lack of knowledge is not likely, the ordinance is not in any sense limited to "cohorts." As discussed above, Chicago acknowledges that the mere presence of a single person reasonably believed by a police officer to be a gang member with no apparent purpose in a public playground with 99 other persons, none of whom are suspected of being gang members, is sufficient to authorize the officer to order all 100 persons to disperse and to arrest those who refuse to do so. Although the ordinance expressly provides that the fact that no gang member was present is an affirmative defense to prosecution (Pet. App. 61a.), the fact that an arrested person had no knowledge that a gang member was present apparently does not provide a defense. And, as the Illinois Supreme Court found, a person "has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal street gang." *Chicago v. Morales*, 177 Ill. 2d 550 (1997) (Pet. App. 11a-12a.)

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In less than three years, the police in Chicago ordered 89,000 people to "move on" from public places and arrested 41,000 of them for failing to do so in a manner satisfactory to the arresting

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[9] The fact that the conduct prohibited by the ordinance is defined by the police officer on the beat is confirmed by Chicago's attempt to reassure this Court that the ordinance is limited in scope. Remarkably, Chicago states that "anyone can loiter alone, or even with others, including criminal street gang members, as long as they move along when directed to do so." Pet. Br. 44 (emphasis added). Thus Chicago concedes that one's right to stand in the streets or parks of Chicago is subject to the unforeseeable whim and caprice of the police.

officers. This large number of arrests for conduct as innocuous as standing on a public sidewalk[10/] makes clear that the ordinance is another version of the abusive and discriminatory "street sweeps" that have been consistently, and properly, condemned by courts and commentators.[11/] The Illinois Supreme Court recognized the true nature of the ordinance, noting that the City Council's intent in enacting the ordinance was to address gang members' ability to avoid arrest for crimes they commit by "craft[ing] an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets." *Chicago v. Morales*, 177 Ill. 2d 440 (1997) (Pet. App. 16a.) Under the long-standing precedent of this Court, the ordinance is unconstitutional.

II.
THERE IS NO REASON TO ABANDON THE *PAPACHRISTOU-KOLENDER* STANDARD

As explained above, and in the briefs of Respondents and their other *amici*, the ordinance is plainly inconsistent with this Court's established jurisprudence. Chicago implicitly recognizes that fact,

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10/ Chicago repeatedly refers to "visibly lawless behavior" as the target of the ordinance. *See, e.g.* Pet. Br. at 9-10, 12, 14, 16, 27. That is clearly not the case. If the behavior was truly "visibly lawless," the person would have an apparent, albeit a lawless, purpose and thus would not, by definition, be "loitering." Moreover, if people are "visibly lawless," they can be arrested under the laws they are violating. For those situations, the ordinance is unnecessary. It is clear that the ordinance intentionally targets behavior that is lawful or innocent. Chicago implicitly concedes as much, stating that it seeks to move persons on or arrest them to "prevent crime before it occurs." Pet. Br. 10 (emphasis added).

11/ During 1994 Chicago used the ordinance to make wholesale arrests as part of "Operation EDGE" in which more than 60 extra officers were assigned to target areas for up to eight hours. Robert Olmstead, *Cops taking EDGE in Crime Battles*, Chi. Sun-Times, July 5, 1994, at 14. In one Operation EDGE sweep in the Englewood neighborhood, 100 people were arrested, 69 of them for gang loitering. *Sweep Nets 100 Arrests*, Chi. Sun-Times, Feb. 6, 1994, at 4. During the summer of 1994, there were more than 2400 arrests in connection with Operation EDGE. Fran Spielman, *Daley to Simon: Quit "Nitpicking" Over Crime Bill*, Chi. Sun-Times, Sept. 1, 1994, at 12.

referring the Court to "commentators [who] have repeatedly called for courts to provide greater leeway for state and local governments to address signs of chronic disorder on the streets." Pet. Br. 15.[12/] The CNO *amicus* brief, authored by one of those commentators, is more forthright, asking this Court to abandon the *Papachristou-Kolender* standard except for those cases in which a law's impact is directed at a "politically disempowered minority." CNO Br. 6. In all other cases, Chicago's *amici* urge, this Court should apply a sliding scale of review that depends on the extent to which members of the affected communities support the challenged law and on the extent to which minority groups subject to the law have achieved political empowerment. *Id* at 11-16. They are wrong.

Although this Court recognized in *Papachristou* and *Kolender* that vague, standardless laws have the potential for racially discriminatory enforcement, the principles of those cases are race-neutral and are properly focused on the specificity that due process requires of all criminal laws, against whomever they may be enforced. Indeed, contrary to the suggestions of Chicago's *amici*, the facts of *Papachristou* were not limited to the arrest of a racially mixed group of defendants, but also included the separate arrests of several other defendants, whose race is not even identified. *See Papachristou*, 405 U.S. at 159-61. This Court has reiterated that standards of constitutional review are "not dependent upon the race of those burdened or benefitted." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989).

Chicago's amici also suggest that this Court need no longer be concerned about the reality and perception of abusive and discriminatory enforcement that are fostered by standardless laws

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12/ Chicago and its *amici* suggest, expressly and implicitly, that gang crime cannot be addressed effectively without giving police this "leeway." Even the Chicago Police Department rejected that notion. In testimony at the City Council Hearings, the Assistant Deputy Superintendent of Police testified that "there are already enough laws in the books at this point [that address the street gang problems], criminal laws, criminal penalties which are much different than the ones that are articulated in the ordinance." Supp. R. II at 181.

because racial minorities have achieved political empowerment. CNO Br.11-12. While it is certainly correct that the political influence of African American and Hispanic citizens is increasing in some of America's large urban areas, it is certainly not correct that conflict between the police and minority communities is no longer a concern.

As noted by former New York City Police Commissioner Patrick Murphy and former Newark Director of Police Hubert Williams:

> [A]lthough the police are better prepared to deal with residents of the inner city than they were 20 years ago, they are far from having totally bridged the chasm that has separated them from minorities - especially blacks - for over 200 years. There are still too few black officers at all levels. Racism still persists within contemporary police departments. Regardless of rules and guidelines, inappropriate behavior on the streets still occurs. Complaints about differential treatment, patrol coverage and response time persist.

Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View, in* Perspectives on Policing (U.S. Dept. of Justice, Nat'l Inst. of Justice No. 13, Jan. 1990). See also discussion, *supra*, at nn.2-4.

The concerns noted in *Papachristou* and *Kolender* have not disappeared for the nation's minority communities. The long history of abuse of standardless laws by officers pursuing their "personal predilections" has produced a lingering corrosive tension between police and minority communities that law enforcement

professionals and commentators recognize as a major impediment to effective law enforcement.[13]

Neither is there any reason for the Court to abandon settled notions of due process because, as certain *amici* urge, the ordinance was "enacted at the behest" of minorities. CNO Br.14. The argument of the CNO Brief is premised on two erroneous propositions. The first is that the "minority community" speaks with a single voice that is dispositive for purposes of constitutional adjudication. There was and is substantial opposition to the ordinance within Chicago's minority communities. The ordinance was enacted over the strong objection of most of Chicago's African American aldermen and the editorial objection of the *Chicago Defender*, Chicago's principal African American newspaper. See discussion in CANS Brief 3 - 6.[14]

CNO's second erroneous premise is that once members of minority communities attain a degree of political power, discrimination will no longer be a matter of concern because minority leaders will not practice or countenance discrimination against "their own." This Court rejected that analysis in *Castaneda v. Partida*, 430 U.S. 482 (1977), a jury composition challenge. The state argued that it was highly likely that the large

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[13] A recent study reached the same conclusion, finding that "African-Americans are more likely to perceive that they are both personally and vicariously hassled by the police [that is, stopped or watched by the police when they have done nothing wrong]. Again, nearly half of African-Americans had been hassled personally and two-thirds knew someone who had been hassled ['vicariously hassled'], while the figures for whites in both cases were about one-tenth of those sampled." Sandra Lee Browning, *et al.*, *Race And Getting Hassled By The Police: A Research Note*, 17 Police Studies 1, 8 (1994).

[14] The need to be alert to the diversity of interests within a community has been noted by community policing experts. "Community, when used in the context of policing, is problematic. . . . Practitioners and researchers alike have discovered that the 'community' cannot be easily defined as a single, unidimensional or monolithic social group. More often, there are many 'communities of interest' within a single neighborhood." Dennis P. Rosenbaum *et al.*, *The Prevention of Crime Social and Situational Strategies* 191 (1998).

disparity between Mexican-American jury-eligible citizens and those summoned for grand jury service was attributable to something other than discrimination because Mexican-Americans held many elective county offices.[15] This minority empowerment, Texas argued, made it unlikely that the disparity was linked to racism because "Mexican-Americans would [not] discriminate against their own kind." 430 U.S. at 490. The Court rejected the argument, concluding that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Id.* at 499.[16]

The *Casteneda* rule was reaffirmed just last Term, in *Oncale v. Sundowner Offshore Servs., Inc.*, 140 L. Ed. 2d 201 (1998). Referring to *Casteneda*, this Court noted that "in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race." 140 L. Ed. 2d at 206 (holding that same-sex discrimination is actionable under Title VII).[17]

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[15] In *Casteneda*, the state based its argument on the fact that Mexican-Americans were a majority of the county population, and controlled the county politically. Even CNO does not suggest that Chicago's African American and Hispanic communities control the city's political structure.

[16] Subsequently, lower courts have consistently rejected the presumption that minorities will not discriminate against other minorities. *See, e.g., Bowen v. Kemp*, 769 F.2d 672, 688 (11th Cir. 1985); *Bell v. Bolger*, 708 F.2d 1312, 1315 n.3 (8th Cir. 1983); *McWilliams v. Escambia County School Bd.*, 658 F.2d 326, 333 (5th Cir. Unit B 1981); *Eccleston v. Secretary of Navy*, 700 F. Supp. 67, 69 (D.D.C. 1988); *United States v. Thomas*, 787 F. Supp. 663, 676 n.18 (E.D. Tex. 1992).

[17] This rule finds considerable support in academic writing. *See* Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. Pa. L. Rev. 1041, 1083-84 n.139 (1984); Edward Patrick Boyle, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 Vand. L. Rev. 937, 966-

(continued...)

Finally, even if the ordinance did have the support of majorities in the African American and Hispanic communities (and there is no basis from which this Court could conclude that is the case), and those communities controlled the politics of the City of Chicago, it would not warrant this Court's abandonment of the fundamental proposition that due process requires criminal law to be sufficiently definite so that police and citizens know what behavior will be deemed unlawful. As this Court declared in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943);

> "the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . .[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections."[18]

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[17](...continued)
67 n.38 (1993); James H. Colopy, *The Road Less Traveled; Pursuing Environmental Justice Through Title Vi of the Civil Rights Act of 1964*, 13 Stan. Envtl. L. J. 125, 136 (1994).

[18] Scholars of community policing have cautioned that apparent support from the community cannot legitimize otherwise objectionable police practices. "None of this is intended to make the police entirely subservient to communities and their desires. The police must continue to stand for a set of values that communities will not always honor. For example, the police must defend the importance of fairness in the treatment of offenders and the protection of their constitutional rights against the vengence of an angry community." Mark H. Moore, *Problem-Solving and Community Policing in* Modern Policing 1992, at 99-158 (Crime & Justice: A review of Research Series No. 15, 1992), M. Tonry & N. Morris, eds.). *Accord* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L. Rev. 551, 658 (1997) ("police must resist rather than respond to community mandates that would violate the constitutional rights of others or require police to act beyond their lawful authority"); and Herman Goldstein, *Toward Community-Oriented Policing: Potential, Basic Requirements and Threshold Questions*, 33, Crime & Delinquency 6 (1987).

III.
THE GANG LOITERING ORDINANCE IS POOR POLICE PRACTICE AND THERE IS NO REASON TO BELIEVE IT WAS OR WOULD BE EFFECTIVE

It is widely recognized today that effective law enforcement requires cooperation between the police and the communities they serve in a mutual effort to solve problems of crime and community safety. *See, e.g.*, Rosenbaum *et al.*, *supra*, at 173-74. This approach is commonly referred to as community policing. Chicago and certain *amici* attempt to justify the "strong medicine," Pet. Br. 38, of the ordinance by claiming that the ordinance with its broad arrest power is simply a manifestation of community policing. They ask this Court to give Chicago "greater leeway," *Id.* at 17, and uphold the ordinance so that Chicago can address gang crime in accordance with what it deems to be modern police practice. But the ordinance is not an example of modern law enforcement. It is yet another example of old-style law enforcement measures rife with potential for abuse. Far from being an expression of community policing, it undermines the essential tenets on which community policing is founded and invites the abusive, discriminatory enforcement that has historically created barriers between police and minority communities.

Central to community policing is the strengthening of relationships between police and community residents. "At the heart of the community policing model is the empirically supported idea that the police are more effective in solving neighborhood problems when they use the resources available in the community than when they try to complete the task alone." Rosenbaum *et al.*, *supra*, at 180. The same truth was recognized by the Kerner Commission, which noted that,

> [i]t is axiomatic that effective law enforcement requires the support of the community. Such support will not be present when a substantial segment of the community feels threatened by the police and regards the police as an occupying force.

Report of the National Commission on Civil Disorders ("Kerner Commission Report") 158 (1968).

A second fundamental tenet of community policing is the use of innovative, flexible solutions to community problems that, unlike traditional law enforcement strategy, do not rely on arrest and prosecution. As stated by Prof. Moore, "The challenge is to use mechanisms other than arrests to produce resolutions and to look outside the department as well as within for usable operational capacity." Moore, *supra*, at 121; *see also* Rosenbaum, *et al.*, *supra*, at 179.[19]

The ordinance undermines both of these fundamental principles of community policing. Most importantly, the ordinance is more likely to weaken than to strengthen police-community relationships. The ordinance sweeps great numbers of people not otherwise in violation of any law into the criminal justice system for merely standing around. The number of persons caught within its wide net is staggering. Chicago's statistics show

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[19] One notable example of apparently successful community policing is San Diego, which implemented a Neighborhood Policing Philosophy in the late 1980's that emphasized alternatives to arrest and prosecution. During the period from 1990-1995, serious crime in San Diego fell by 36.8%. The number of misdemeanor and felony arrests in San Diego during the overlapping period of 1993-1996 also fell by 15%. Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, Crime & Delinquency (forthcoming April 1999) (manuscript at 12). Another example is the Boston Gun Project, which dramatically reduced gun violence among Boston gangs by "reaching out directly to gangs, setting clear standards for their behavior [the cessation of gun violance], and backing up that message by 'pulling every lever' legally available when those standards were violated." David Kennedy, *Pulling Levers: Getting Deterrence Right*, Nat'l Inst. Just. J. (July 1998). Boston's enforcement of clear standards is in marked contrast to the standardless approach of the ordinance.

that during the less than three years that the ordinance was enforced, more than 89,000 people were ordered by police to "move on." More than 41,000 of those people were actually arrested for failing to respond to a police order in a manner that satisfied the particular arresting officer.[22] Thus, rather than reduce the adversarial interactions between the police and members of the community, the ordinance multiplied them.

The effect of such a large number of arrests under the ordinance not only reinforces the perception of the police as a hostile force, it damages further the reputation of the police in the community because the consequences of arrest are likely to be fleeting. Chicago Deputy Police Superintendent Gerald Cooper recognized that problem when testifying before the Chicago City Council concerning the then-proposed ordinance. After noting that the Cook County jail had a capacity of only 6,500 and that arrests in Chicago during the year prior to the enactment of the ordinance exceeded 350,000, Mr. Cooper stated:

> So what happened to those people. They all came out the other end.
>
> So, of course, that is a consideration for us because that makes our job even more difficult if people feel they can thumb their nose at us. If they feel so what, if the police do come along and take us to the station, we can get out on an I-bond. We will be back out on the street before they do.

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[22] The number of arrests increased dramatically throughout the three years that the ordinance was enforced. According to statistics prepared by Chicago and lodged with the Court, in 1993 there were 5,251 arrests under the ordinance, in 1994 there were 15,660 and in 1995 there were 22,056. *See* Richard M. Daley & Terry G. Hillard, *Gang and Narcotic Related Violent Crime: City of Chicago 1993-1997* (1998) ("Five Year Report").

> So what if we do have to go to court in a couple of weeks. We go to court. The courts are so crowded. They look at the case and they throw it out.

Supp. R. II at 176-77.

Cooper's implicit prediction that the ordinance would breed contempt for the police is borne out by the sheer number of people who failed to comply with police orders. The fact that nearly half of those who were ordered to move on were arrested for failing to do so to the satisfaction of the arresting officer represents a stunning number of citizens unwilling to heed a direct law enforcement order. This can be interpreted in several ways: (i) citizens resented the "move on" order in the face of their apparently harmless behavior; (ii) citizens had tremendous contempt for police generally; or (iii) police did not properly explain the consequences of failing to obey the "move on" order. In any case, the Chicago experience does not reflect successful community policing.

Another likely explanation for the large and increasing number of arrests is that the officers simply did not notify citizens to "move on" prior to taking them into custody. Instead they used the ordinance as a pretext to arrest or to "sweep" the streets of persons they deemed undesirable. Such street sweeps represent the antithesis of modern community policing. The ordinance is not -- unlike Boston's Gun Project -- targeted to enforcement of clearly defined standards of conduct. It is, rather, a continuation of a standardless approach to policing that has been repeatedly recognized as counterproductive since the Kerner Commission Report examined the causes of civil disorder in 1968.

Indeed, the Kerner Commission's discussion of police attitudes toward minority youth is apposite to this case:

> Some conduct [by the police] -- breaking up of street groups, indiscriminate stops and searches -- is frequently directed at

youths, creating special tensions in the ghetto where the average age is generally under 21.

• • •

Because youths commit a large and increasing proportion of crime, police are under growing pressure from their supervisors -- and from the community -- to deal with them forcefully. "Harassment of youths" may therefore be viewed by some police departments -- and members even of the Negro community -- as a proper crime prevention technique.

Kerner Commission Report, *supra*, at 159.

Even the commentators relied on by Chicago and its *amici* have recognized that "[s]treet sweeps," such as those invited by the ordinance, are not effective or constitutionally permissible. For example, George Kelling, explicating his earlier "Broken Windows" theory, cautioned that "[s]weeps, inherently a short term and legally marginal placebo, often worsen the situation for residents and local police: they alienate innocent youths caught up in them (as well as their parents), and are meaningless to real troublemakers for whom an arrest is a minor irritant." George Kelling & Katherine Coles, *Fixing Broken Windows* 166 (1996). Kelling further asserted that "the ideas presented in 'Broken Windows' were antithetical to the use of 'street sweeping' tactics targeted on 'undesirables.'" *Id.* at 22. Similarly, Debra Livingston has written that "[P]olice scholars advocating focus on neighborhood disorder also cautioned that employing resurrected . . . reform era methods to 'sweep up,' . . . 'move along,' and arrest persons threatening some conception of public order was dangerous, and contrary to the role for police that they endorsed." Livingston, *supra* note 18, at 581.

Chicago's half-hearted attempt to wrap the ordinance in the mantle of community policing cannot disguise the true nature of the ordinance -- a mechanism that permits the police to conduct street sweeps of precisely the sort that courts and responsible

commentators have correctly condemned as unconstitutional and ineffective.

IV.
THERE IS NO REASON TO BELIEVE THAT THE GANG LOITERING ORDINANCE WAS EFFECTIVE IN REDUCING GANG CRIME IN CHICAGO

Chicago contends that enforcement of the ordinance "had a substantial effect on the level of gang-related violence in Chicago." Pet. Br. 16. That contention is echoed by several of the City's *amici*. *E.g*, Amicus Brief of National District Attorneys' Association 11; CNO Br. 24. The United States, somewhat more cautiously, asserts that the ordinance "appears to have had significant impact." U.S. Br. 2.

There is, however, no significant evidence that enforcement of the ordinance produced any reduction in gang-related crime.[21] Chicago's own data flatly contradict its claim that "if fewer gang members are loitering . . . fewer of them -- and innocent people nearby -- will be shot to death." Pet. Br. 16-17. Chicago emphasizes that in 1995, the last year Chicago enforced the ordinance, gang-related homicide in Chicago dropped more rapidly than total homicides did. *Id.* Yet precisely the same trend prevailed during the next two years, a period when the ordinance was not being enforced.[22] Apparently, suspension of the ordinance

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[21] Whether the ordinance has an effect on crime does not, of course, affect constitutional analysis. It would likely reduce crime if all young men between the ages of 16 and 21 were confined, yet no one would suggest that such an approach would be constitutionally permissible.

[22] From 1995 to 1997, gang-related homicides dropped 13%, again a steeper decline than the 8% drop in the overall homicide rate for that two-year period. Chicago relies, in its Petition, on a contrast between homicide trends in 1995 and 1996: In the former year (when the ordinance was enforced), gang-

(continued...)

either reduced gang-related homicides or, more likely, it was simply irrelevant to homicide levels that are driven by far more complex phenomena.[23] None of the available evidence supports Chicago's claim that the ordinance reduced gang-related homicides.[24]

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[22](...continued)
related homicides fell faster than the total. For 1996, Chicago reports that gang-related homicides rose by 7%, though total homicides were still falling. Pet. Br. 16. However, Chicago's claims reflected a short-term statistical aberration. The following year, with enforcement of the ordinance still suspended, gang-related homicides dropped 19%, a much steeper decline than the 4% drop in the overall homicide rate for that year. *See* Five Year Report at 4-5.

[23] The latter view is held by the principal experts on the implementation of community policing in Chicago. *See* Chicago Community Policing Evaluation Consortium, *Community Policing in Chicago, Year Four: An Interim Report* (Nov. 1997) (discussing numerous factors that contributed to Chicago's declining crime rates but omitting any mention of the gang-loitering ordinance). The published article Chicago cites, Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191 (1998), relies exclusively on data prepared in January 1996 and therefore takes no account of the downward trend in gang-related homicides that continued after enforcement of the ordinance was suspended. Viewed in light of the Police Department's own analysis of more recent data, the out-of-date Police Department claims relied on in Meares' article no longer have any conceivable relevance.

[24] In the new set of statistics that Chicago presents to the Court, Chicago refers for the first time to offenses other than homicide, and claims that suspension of the ordinance produced increases in 1997 in two selectively reported crime categories: "gang related aggravated battery with a firearm" and "drive-by shootings." Br. 16 n.11 (referring to the Five Year Report). But the trend in these two, highly particularized offense categories is on its face anomalous. If, as Chicago's data suggests, gang-related aggravated battery with a firearm rose by 11% and drive-by shootings rose by 10% at a time when gang-related homicides were declining by 19%, *see* Five Year Report at 5-7, then either the fatality rate for reported shootings dropped precipitously during the year or, more likely, the assumptions used to classify these offense reports changed significantly. There are strong grounds to suspect that less serious cases excluded in the earlier year (or perhaps not reported to the police) were reported and included in 1997. Even accepting this self-serving and unverified data at face value, therefore, there is strong reason to doubt whether the statistics in question were compiled on a (continued...)

CONCLUSION

Chicago and its *amici* contend that criminal street gangs are ushering in a new era in crime -- crime that cannot be controlled by existing laws, crime that demands the type of drastic preventative law that sweeps thousands of persons into the criminal justice system for standing on a public sidewalk or other public place. Chicago and its *amici* assure this Court that the constitutionality of the ordinance cannot be doubted, particularly because it is supported by members of the community. These arguments are not new. The ordinance is no different than other laws this Court has found unconstitutional. Indeed, this Court's admonitions in *Papachristou* easily could have been written expressly in response to Chicago's Gang Loitering Ordinance:

> The implicit presumption in these generalized vagrancy standards -- that crime is being nipped in the bud -- is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.

Papachristou, 405 U.S. at 171. Just as this Court correctly held in *Papachristou* that the Jacksonville loitering law was unconstitutional, the Illinois Supreme Court correctly held that Chicago's Gang Loitering Ordinance was unconstitutional.

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[24](...continued)
consistent basis. This Court has never before based a change of constitutional doctrine on unverified data that changes from month to month.

Accordingly, the judgment of the Illinois Supreme Court should be affirmed.

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